

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:)	
)	
O.M.)	
)	
)	
A.S. and M.M.,)	
)	
Petitioners)	
VS.)	NO. 05-46
)	
)	
SHELBY COUNTY SCHOOLS,)	
)	
Defendant)	
)	

O R D E R

I. PRELIMINARY STATEMENT

This case centers around an 8 year old student, O.M., whose primary diagnosis is autism and secondary diagnosis is mental retardation. A dispute arose between the parents of O.M. (hereinafter referred to as "petitioners") and the Shelby County school system (hereinafter referred to as "SCS") when the home school employees, employed by the parents, convinced the petitioners that the school system was not adequately coordinating the home school program. The petitioners came to believe that the school system failed to train home personnel, failed to accept home progress reports and failed to properly coordinate the administration of certain tests and programs.

The petitioners allege that these failures resulted in a discrepancy between the goals and objectives O.M. met at school versus the goals and objectives met at home. The home school component was a specific aspect of the IEP and the school system was paying a small stipend to the parents toward payment of the home school personnel employed by the parents.

The petitioners relied heavily on their behavioral analyst, Tracy Palm, who expressed criticisms of the school's failure to effectively apply behavioral techniques and failure to properly train the home school personnel in the administration of the ABLLS index. Ms. Palm's believes that this failure resulted in the school IEP team failing to properly discern the present level of functioning for O.M. and thereby failing to properly establish goals and objectives. This concern was expressed by O.M.'s mother and resulted in such controversy at the IEP meeting on September 5, 2005, that a Due Process Hearing request was signed by the student's mother at the conclusion of that meeting.

The petitioners are not seeking any reimbursement for past educational expenses that they have paid to private providers prior to September of 2005.

II. ISSUES TO BE DECIDED

- A. Whether or not the parents were unlawfully denied the opportunity to participate meaningfully in the formulation of O.M.'s educational plan.
- B. Whether the school system based the goals and objectives set forth in the IEP on meaningful and reliable data.
- C. Whether the school system utilized a functional behavioral assessment to assess the present level of performance for O.M. so that his goals and objectives would be accurate.
- D. Whether or not the 2005-2006 IEP is reasonably calculated to achieve FAPE.
- E. Whether or not the failure of the school system to coordinate the home school program with the school program resulted in a denial of FAPE.

III. FINDINGS OF FACT

1. O.M. is an eight (8) year old second grade student in the Shelby County school system. His primary diagnosis is autism with a secondary diagnosis of mental retardation. His diagnosis

came when O.M. was evaluated at the University of Tennessee Boling Center in 2002. (T. Vol. 1, pp.20-21)

2. O.M. is a happy, low maintenance, non destructive, loving child, and shows no aggressive or tantrum activity. He comprehends, but has not excelled as well in expressive behaviors. (testimony of father)

3. At all times, the parents of O.M. were afforded a meaningful opportunity to participate in the development of their child's IEP. Both parents testified that they had attended dozens of IEP meetings (Student's father attended at least 8 last year). The student's mother recognized that she could call an IEP meeting at any time and the school system would respond appropriately. The parents were always welcome to visit the school and they were never denied the opportunity to bring their behavioral analyst to an IEP meeting. (Parents)

4. The parents of O.M. are successful and highly motivated individuals. The father is a nephrologist (T. Vol I, page 19) and the mother is a pediatrician with a special interest in developmental pediatrics, specifically, in recent years, autism. (T. Vol I, page 20; Vol V, page 166). The parents believe that O.M. has progressed academically very well and there is no

problem with his academic growth. (testimony of student's father)

5. Until late August and into early September, 2005, there has been a unity of work between the school and the parents. The student's mother testified that SCS called an IEP team meeting every time she requested and communication has been good between her and the school. The student's mother further stated that SCS held 26 formal IEP meetings from February of 2000 to September of 2005 and O.M. was not enrolled during the 2001-2002 school year. In 2004-2005 alone, there were 8 team meetings.

6. While O.M. progressed well academically, he had less success in expressive language. The petitioners hired Martha Imes - originally as an inclusionist and then as a home therapist using Applied Behavior Analysis ("ABA") - to assist in O.M.'s education, particularly language (T. Vol. II). O.M. was enrolled at that time (the 2002-2003) school year) in kindergarten at Dogwood Elementary School in the SCS. Working with Ms. Imes one-on-one, O.M. began to use language expressively for the first time. His language development did not progress as rapidly at school. (T. Vol. II, pp.86-91)

7. Excited about O.M.'s progress in expressive language, the petitioners then employed Kathryn (Katie) Nichols in the summer of 2003 to accelerate O.M.'s language development. (T. Vol. I, pp.22-23; 100-101; Vol VI, page 73). Ms. Nichols holds a MA and EdS in school psychology from the University of Memphis (T. Vol. I, p. 81; T. Vol. II, p. 89, Exh 8). Utilizing her skills in developing ABA based education for children with developmental delays, Nichols developed goals to expand O.M.'s understanding and use of language. (T. Vol. 1, 00. 102, 157-159; Exh. 19)

8. The home school component is primarily supported, financially, by the petitioners. Ms. Nichols is paid at the rate of \$25.00 per hour (Nichols; Exh. 11), Ms. Imes is being compensated at the rate of \$15.00 per hour (Imes; Exh. 11), and the school is voluntarily reimbursing the petitioners at the rate of \$9.00 per hour for 15 hours of home instruction, pursuant to the 2004-2005 and 2005-2006 IEP (Parent testimony) Tracy Palm is also presently employed by petitioners.

9. The parents and SCS initially experienced some conflict in the development of O.M.'s goals and objectives when the parties disagreed over the use of phonics for O.M. in establishing the 2004-2005 IEP. The home program headed by Katie Nichols wanted phonics and the school program felt that the Edmark Sight -

reading program was best at this time. O.M. progressed under this IEP even though phonics was later added at school, as well. One specialist observing O.M. in kindergarten, being taught via Edmark, commented, "O.M. did extremely well with this program and its format." O.M. could discriminate between instructions, "read," "what word" and "touch word." He moved rapidly through the exercise with a high level of accuracy." O.M. read the sentences with minimal prompting and matched with approximately 70% accuracy." (Exh. 4)

10. Excited about O.M.'s continued progress and emerging verbalization skills, the petitioners employed Dr. Norah Wilson in April of 2004 to evaluate O.M.'s educational program and recommend strategies for generalizing acquired skills and accelerating his progress. (T. Vol VI, 0.23) Dr. Wilson is Clinical Director of Best Services, Inc., an organization based in California that provides educational and behavioral services to children with autism and other developmental delays. (T.Vol.I, pp. 23, 48-512, 115-116; Vol. 11, pp.74-75). Dr. Wilson observed O.M. in both the school and home setting and noted that he had one-on-one assistance at both forums. (Ex. 4, Best report)

Dr. Wilson made the following observations and recommendations:

O.M. is an intelligent boy who looks to those around him to guide him through most of his daily activities. Both his home and school program have identifiable strengths independent of one another. It was clear during the observation period that O.M. has two good programs. However, O.M. should have only one good program. An integrated program between home and school that is supervised by one person who can bring both programs closer together is necessary to increase O.M.'s level of success. At present, O.M. has two programs that, at times, compliment one another, but at others work against each other. (Exh.4, p.6)

Accepting Dr. Wilson's report, the petitioners approached the school system concerning a more coordinated approach and Ms. Joyce Keohane, the coordinator for SCS suggested that the school and home personnel begin the use of the Assessment of Basic Language and Learning Skills ("ABLLS") testing index with O.M. to give a better picture of his present level of functioning. This proposal was adopted at an IEP meeting in May, 2004. (T.Vol. VI, p.55) Had the SCS dropped the home school component from the IEP, at this point, O.M. would still receive FAPE.

(Dr. Troutman)

11. Initially, the petitioners believed that the school provided the best progress for their child and encouraged their employees in the home school program to follow the school's lead. (T. Vol, VI, p 23)

12. Conflict again began to surface when the home school personnel came to believe that they were more successful with O.M.'s goals and objectives than the school and the school required video tapes of O.M.'s performance at home. Ultimately, the home personnel grew concerned that repetition of mastered skills was causing harm to O.M. and in spite of school caution, the home personnel wanted to move to new objectives (T. Vol I, p. 127)

13. As questions began to surface in the mind of the petitioners arising out of the B.E.S.T. report, as set forth above, and these new concerns, the petitioners employed a behavioral analyst, Tracy Palm, for new recommendations (T. Vol. VI). Tracy Palm was employed in July and gave recommendations to the student's mother. At the August 30, 2005, IEP meeting, 80% of those recommendations were adopted by the IEP team. (Mother's testimony). This IEP meeting lasted approximately 3-1/2 hours

(testimony of Wendy Ashcroft and Joyce Strickland). The student's mother announced that this was the best IEP meeting that she had ever attended (testimony of Wendy Ashcroft) and that she wanted to find a house in the Riverdale school district because she was so happy with the program. (testimony of mother, Vol. VI, page 102-103)

14. Finally, based upon comments by Tracy Palm, the petitioners indicated that SCS did not train home personnel in the proper protocol for administering the ABLLS testing index. However, the failure to coordinate the testing of the ABLLS and any claim by the petitioners that the 2005-2006 IEP is inherently flawed due to this failure is misplaced. The school program, even without the home program, would be sufficient to meet FAPE (Dr. Anne Troutman) However, the failure to coordinate the administration of the ABLLS and the lack of effort by the SCS to train and actively pursue a coordinated effort at home opens the door for frustration and failure on the part of this autistic child. (Exhibit 4, Dr. Wilson) There is evidence that the child was being more and more frustrated. (Student's mother, Katie Nichols, Martha Imes)

15. While the use of the ABLLS test was perfectly appropriate

as a tool to gauge O.M.'s level of performance, the failure of the SCS to train the home personnel in the use of the instrument created a discrepancy that, when relied upon, would cause the goals and objectives of O.M. to be less reliable than if all parties used the same protocol. (Dr. Wilson, Exh. 4, Tracy Palm testimony). According to Dr. Troutman, the criticism of Tracy Palm based upon this discrepancy has merit, but it is not that big of a deal. (Dr. Troutman). Dr. Troutman further testified that she had not met with the home team.

16. Dr. Anne Troutman testified as an expert in this case and the court found her to be credible and knowledgeable concerning O.M.'s IEP, Behavioral Analysis, and the regulations pursuant to IDEA. Dr. Troutman is an expert in the education of children with autism spectrum disorders. Dr. Troutman authored a widely used book on the utilization of applied behavior analysis in education. This book is in its seventh edition. She is also an expert in the area of determining present levels of functioning for the creation of goals and objectives in an IEP. Dr. Troutman has observed O.M. and reviewed his educational program. Dr. Troutman has opined that O.M. has made considerable progress and that the current IEP provides FAPE as defined in the IDEA.

17. At the time of making her recommendations to the student's

mother, Ms. Palm had spent roughly ten hours observing O.M. and his program. (Deposition of Tracy Palm)

18. After the August 30, 2005, IEP meeting, the student's mother and Ms. Palm reviewed O.M.'s IEP and concluded that there were further discrepancies between the goals and objectives that should be used at home versus school. (Mother) However, considering the entire program for O.M., Tracy Palm, at her deposition, could only identify five goals and objectives out of 55 goals and objectives outlined in the IEP that she felt were inappropriate. (Tracy Palm deposition)

19. The IEP created for O.M. was created under Project Reach, the autism program for SCS and involved an applied behavioral analysis approach. This IEP was reviewed by Dr. Anne Troutman, a noted expert in the field of behavioral analysis as it applies to IDEA and FAPE. Dr. Troutman determined that this program implemented under the Project Reach program would provide FAPE for O.M. Dr. Troutman has never previously worked with O.M. (Dr. Troutman testimony)

20. Joyce Strickland who is O.M.'s teacher probably had the best view of SCS's concept of the home school program when she opined that it was her understanding that the home program

should be complimentary of the school program and verify it. She indicated that she thought the home program would enhance O.M.'s progress. (testimony of Joyce Strickland)

In contrast, Martha Imes, a home teacher, testified that the biggest obstacle to O.M.'s education is that there is not enough communication between the home and school. (Imes, Vol. II, p. 31) Further, Ms. Imes testified that she is not qualified to design an educational program for O.M. (Imes, Vol. II, p. 92)

21. School personnel were not intentionally avoiding or refusing to work with the home school personnel and, in fact, the evidence is to the contrary. O.M.'s former teacher, Tina Perry, continually sent home the IEP goals on almost a daily basis for the home personnel to review and work on. (testimony of Tina Perry)

22. There is no proof in the record to support a finding that O.M.'s goals and objectives outlined on his 2005-2006 IEP are inappropriate in any way. In fact, it is apparent that O.M.'s IEP meets the requirements of FAPE under the IDEA even without the home school component. (testimony of Dr. Anne Troutman)

However, the SCS chose to add the home school component to the IEP and there is strong evidence that this portion of the IEP

was not properly implemented (Katie Nichols, Martha Imes, student's mother). The failure to train the home personnel in the use of the ABLLS is only one basis for this conclusion. (Katie Nichols, Martha Imes).

22. The Court further finds that SCS failed to create, initiate, coordinate, and persistently recommend, on a continual basis, that the school program be followed. Further, SCS failed to insure that the testing protocol be administered in a like manner. These failures on the part of SCS are evidence that the IEP was not appropriately implemented. While the home personnel are paid for, in large part, by the petitioners and are not employees of the SCS, there is significant evidence that the school's best efforts at coordination was the belief that it was incumbent upon the home staff to request training and direction in the implementation of the program. There is further evidence that the home staff did not receive any training in the use of the ABLLS, and thereby opened the door for the possibility of inaccurate goals and objectives for O.M. (testimony of Katie Nichols, Tracy Palm, Martha Imes, Tina Perry, and Anne Troutman). At best, the SCS sent data and work sheets home with O.M. on a regular basis believing that this was sufficient coordination.

24. The parents further believe that the school system did not offer training for the home school personnel and this failure has hurt the child's opportunities. The student's mother analogized that the home school program and the school program are "like the right ventricle and the left ventricle – both must work together." (Mother's testimony)

25. In general, the school personnel failed to initiate and complete training, coordination, and cohesiveness with the home personnel hired by the parents of O.M. even though the home school component was an integral part of the IEP for O.M. (testimony of Katie Nichols, Martha Imes, and Tina Perry)

IV. DISCUSSION AND CONCLUSIONS OF LAW

This case arises under the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. 1400 et seq. The student, O.M., appears by and through his parents. O.M. is enrolled as a 2nd grade student within the Shelby County School System.

The main issues in this case can be summarized as the parents' belief that O.M. has not been provided FAPE due to numerous inconsistencies between the home school program and the school program. These inconsistencies arise out of a lack of coordination on the part of the school system. It is further

alleged that the SCS failed to properly train the home school personnel to administer the ABLIS, a testing index that would allow the school to know the present level of functioning of O.M., and thereby establish acceptable goals and objectives for O.M. The parents opine that this failure results in a skewed IEP and thereby a denial of FAPE.

The mother of O.M. filed their request for due process proceeding on September 5, 2005, while attending an IEP meeting when she became frustrated because the SCS would not employ the parents behavioral expert, Tracy Palm. In substance, the petitioners' primary conflict at that time was the failure of the SCS to employ Ms. Palm and thereby add a link in the school program that would assist in the coordination of the home school and school programs.

The IDEA requires that every state that receives federal funds for the instruction of children under IDEA must make a "free appropriate education ("FAPE")... available to all children with learning disabilities" between the ages of three and twenty- one years of age who reside within that state.

A key component of providing FAPE is establishing and

implementing a program that is provided within the parameters of the individualized educational program required under section 1414(d) of the Act.

The IDEA contains specific requirements for both the IEP and the make-up of the team creating the goals and objectives for the identified child. Within the guidelines, the team must create an IEP that contains a statement of the student's present level of functioning; a statement of measurable annual goals; and objectives toward which the school personnel will strive.

20 U.S.C 1414 (d)(1)(A)

The IEP is "the centerpiece of the IDEA's education delivery system for disabled children." Honing v. Doe, 484 U.S. 305, 311(1988). The purpose of the IEP is to provide the map by which the school system can navigate the goals and objective stated therein and provide for a meaningful experience for the student. In addition, the school must ensure "that all services set forth in the student's IEP are provided, consistent with the child's needs, as identified in the IEP. 34 C.F.R. 300, App. A. In essence, if the school system fails to fully implement the student's IEP, the question becomes whether that failure deprived the student of his/her educational benefits. Roland M. v. Concord School Comm., 910 F.2d 983, 994 (1st Cir. 1990). 20

U.S.C. 1414 (d)(2)(A)(B)

If there has been educational harm, the appropriate remedy is compensatory educational services to the extent that such services were not delivered. Phil v. Massachusetts Dept. of Education, 9 F. 3d 184, 187-188 (1st Cir. 1994). The party making such a challenge must demonstrate that the school failed to implement substantial or significant elements of the IEP in essence showing a material failure to implement. Houston Independent Sch. Dist. v. Bobby R, 100 F.3d 341 (5th Cir.), cert denied, 531 U.S. 817 (2000).

The IEP for O.M. created by the SCS and the involvement of the parents was both comprehensive and sufficient to provide FAPE for O.M. The IEP provided both a school program that was fluid to the extent that it could assess and meet changing goals and objectives and it contained a home school component that complimented and extended the school program. The home school program was carried out by trained professionals employed by the parents of O.M. It is undisputed that O.M. showed signs of progress as a direct result of the home school aspect of this IEP and it was, therefore, an integral part of the overall plan.

As drawn, the home school aspect of the IEP was a significant

part of the total package provided to O.M.

In this case, however, the IEP was not implemented as written and those failures were significant. SCS violated O.M.'s IEP when they failed to take measures to coordinate the home school component with the school component. The testimony from the home school personnel was replete with frustration over their inability to continue with the school goals and objectives when the home personnel were outside the accessible field of information with which to utilize the same behavioral discriminatory stimuli necessary to succeed in a behavioral analysis environment. Further, the home school personnel had no training from the school personnel to develop a consistent means of measuring the students' functional assessment. This inconsistency created a fictitious baseline from which daily behavioral analysis would be applied. The result being the student had an excellent opportunity to excel within this IEP, but because of its faulty implementation, he was able to excel to a lesser extent.

The SCS cannot rest on the failure of the home personnel to seek the school administration for training and coordination. The IEP was developed by the school and it was incumbent upon the

school to implement that program.

Implicit within the congressional purpose of providing FAPE, is the requirement that the program be sufficient to confer some educational benefit upon the identified child. Board of Education of Hendrick Hudson Central School District v. Rowley, 485 U.S. 176, 102 S. Ct. 3034 (1982). Without question, it has been consistently held that a school system is not required to maximize an identified student's educational potential. Wilson County School System v. Clifton, 41 S.W. 3d 645 (Tenn.Ct.App. 2000) Here, however, the school chose, for whatever reason, to create a program that raised the bar on their compliance. It is apparently true that the school program alone would have met the requirements of FAPE. However, the school chose to go beyond and include a home school component to the IEP. It wasn't until the SCS failed to implement the home portion of the IEP sufficiently that the parents hired a behavioral analyst to coordinate the programs. Certainly, it was not the petitioners' responsibility to take on the implementation of the IEP.

In delivering this *de minimus* "plus" educational benefit, the focus is not on what the parents of a child want, but on the school system's ability to implement the program. Tucker v. Calloway County Bd. of Educ., 136 F. 3d 495 (6th Cir. 1998)

O R D E R

1. The parents' request for the employment of a private vendor, Tracy Palm, is denied because the petitioners have failed to demonstrate that the district was incapable of providing the necessary educational services. Quite to the contrary, the school personnel are exceptionally trained and well qualified to administer the IEP for O.M.

Had the school fine tuned their implementation, all would have been well and O.M. would truly have received the educational benefit envisioned by the IEP. By including the home school component within the IEP and then failing to implement it adequately, the course became distracted and the evidence was clear that a progressing child became frustrated. And yet he continued to progress without significant harm. In large part, this is due to the immediate action of petitioners.

The IEP proposed by the school and agreed to by the parent is based upon accepted, proven methodology, and reasonably calculated to provide an appropriate education for O.M. The SCS highly trains its professional staff and for that reason their programs, such as Project Reach, are highly efficient and

provide FAPE. To ignore the training and coordination of the home personnel when this is a specific, identifiable, and important aspect of the IEP for O.M. suggests a lack of concern for that portion of the IEP.

2. The failure of the SCS to coordinate the testing protocol of the ABLLS and to train the home team in consistent use of discriminatory stimuli (SD's) and insure that the objectives are consistently followed is a failure to implement the IEP developed by the team. While the Court believes, along with Dr. Troutman, that the school portion of the IEP standing alone provided FAPE for O.M., when the IEP team added the home school component to the IEP, that team must have felt that it was important and would provide significantly more than a *de minimus* education for this child.

3. Shelby County Schools shall assign an employee with expertise in ABA techniques to develop a written curriculum for O.M. which can be utilized by home personnel and the parents of O.M.

4. The home curriculum shall include specific lesson plans, goals and objectives, and the materials necessary to implement this plan.

5. The home curriculum shall mirror the school curriculum and shall be reviewed and approved by the IEP team.

6. The home curriculum shall be in place no later than January 3, 2006, and shall continue for a period of at least one (1) year ending on December 31, 2006. This curriculum shall not include the summer months.

7. Home school personnel shall be invited, in writing, to receive training at school within thirty (30) days of this order in the proper testing protocol for ABLLS. They shall also be invited to attend an ABA training session within the next six (6) months.

8. The home coordinator identified in Paragraph 3 above shall visit the home to observe the implementation of the home lesson plans at least every other week and make a written report within five (5) days of such visit commenting on whether the home teacher followed the proper curriculum lesson plan. This report shall be addressed and delivered to the student's mother and Director Jo Bellanti.

9. If the home school personnel fail or refuse to follow the

curriculum and lesson plans created by the system's home coordinator, the coordinator shall include such failure of resistance in the report.

10. In that there was no meaningful evidence of past harm to the child and due to the immediate action of the petitioners, as well as their refusal to waive the 45 day period, the Court does not declare either party to be the prevailing party.

Enter this the ____ day of November, 2005.

Michael E Spitzer
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Mr. Timothy Smith, SMITH SHEAHAN, 2670 Union Extended, Suite 1200, Memphis, TN 38112 AND Mr. Stuart Breakstone, Attorney at Law, 200 Jefferson Avenue, Suite 725, Memphis, TN 38103, by enclosing the same in envelopes addressed to them, with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mail box on this the _____ day of November, 2005.

ATTORNEY